**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **KEVIN R. SIMPSON** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| **ALLEN FOODS, INC.** | ) | |
| Respondent | ) | Docket No. 1,014,296 |
| | ) | |
| AND | ) | |
| | ) | |
| **EMPLOYERS INS. CO. OF WAUSAU** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant requested review of the January 21, 2005 Award by Administrative Law Judge (ALJ) Robert H. Foerschler. The Board heard oral argument on July 12, 2005.

### APPEARANCES

Keith L. Mark, of Mission, Kansas, appeared for the claimant. Michelle Daum Haskins, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The Award failed to include the vocational analysis report authored by Michael Dreiling which was entered into evidence pursuant to the parties' stipulation. Thus, this report is, by agreement, to be considered part of the record.

## ISSUES

At the Regular Hearing, the parties announced their stipulation that claimant sustained a 17.25 percent functional impairment as a result of his May 20, 2003 accident. Thus, the single issue presented to the ALJ was that of claimant's entitlement to permanent partial general (work) disability under K.S.A. 44-510e(a).

Although the evidence is uncontroverted that claimant did not return to his position with respondent following his accident and subsequent release from treatment, the ALJ concluded there was inadequate proof to award work disability. The ALJ relied upon the opinions expressed by Dr. John W. Collins, the treating physician, who opined that claimant was able to perform all of the tasks outlined by Michael Dreiling and theoretically had the ability to return to his pre-injury job.

The claimant requests review on the sole issue of work disability. Claimant argues that the ALJ erred in failing to award work disability benefits inasmuch as there is uncontroverted evidence that respondent did not take claimant back to work following his injury due to the restrictions imposed by Dr. Collins. And as a direct result, claimant was forced to find alternative employment which translates into a 38 percent wage loss. Thus, based upon the uncontested evidence contained within the record, claimant maintains he is entitled to work disability benefits under K.S.A. 44-510e(a).

Respondent argues that claimant is not entitled to work disability because he is earning 90 percent or greater of his average weekly wage at the time of injury.[1] Accordingly, the Respondent contends the Award should be affirmed in all respects.

The only issue to decide is whether claimant is entitled to work disability under K.S.A. 44-510e(a) and if so, to what extent.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The underlying facts of the claimant's accident are, at this point, irrelevant. The respondent has stipulated to all compensability issues for the accident occurring on May 20, 2003. Respondent has also stipulated to a 17.25 percent functional impairment

[1] Respondent's Brief at 1 (filed Mar. 17, 2005).

as a result of that injury and has since tendered the value of that impairment.[2] The only remaining dispute between the parties is whether claimant is entitled to a work disability under K.S.A. 44-510e(a).

Permanent partial general (work) disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> . . .The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Based upon the language set forth above, the finder of fact must determine first, whether claimant sustained a wage loss in excess of 10 percent following his compensable injury. If that burden can be met, then the finder of fact must also determine the extent of the claimant's task loss. Those two figures are then averaged for purposes of a work disability finding.

In this case, the ALJ did not make any specific findings with respect to the wage and task loss components reflected in the statute, as he concluded there was an insufficiency of evidence to persuade him that claimant sustained any task loss as a result of his injury. He further commented that the claimant had retained alternative "suitable" employment and could expect "advancement in earnings."[3] The Board has reviewed the record and concludes the ALJ's Award must be modified.

When claimant was released from active treatment with Dr. Collins, claimant testified he was given restrictions by Dr. Collins that limited him to no lifting over 20 pounds and to avoid any extended standing, walking bending, squatting or kneeling.[4]

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[2] At oral arguments counsel for both parties informed the Board that the permanent partial impairment benefits were paid and this was no longer an issue.

[3] ALJ Award (Jan. 21, 2005) at 5.

[4] R.H. Trans. at 14.

Claimant returned to his employer and reported to Jim Walls, his immediate supervisor, informing him of his restrictions. According to claimant, he was not accepted back to work because he was "less than a hundred percent recovery."[5]

It is uncontroverted that claimant was never offered any sort of accommodated job following his return to work. Indeed, at no point during this litigation did respondent ever argue that claimant exhibited bad faith in failing to return to work or failed to secure appropriate employment. To his credit, claimant immediately set about finding appropriate employment.

Within a month of his release, claimant found employment with another employer and presently earns $12 per hour, working 40 hours per week. Claimant testified that he works, on average, 4-5 hours of overtime per week, earning $18 per hour, although he concedes there was at least one instance when he worked as much as 18 hours of overtime in a week.

Based upon the documents entered into evidence, it appears that claimant's present job earns him $480 base salary ($12 per hour times 40) along with an average overtime of $45.54 per week (an average of all the overtime paid during the 16 weeks reflected in the stipulation)[6] and $56.12 in fringe benefits (which reflects the weekly amounts paid by the claimant's present employer, excluding that portion paid by claimant), for a total sum of $581.66 per week. When this figure is compared to claimant's pre-injury average weekly wage, the resulting wage loss is 38 percent. This 38 percent wage loss is directly attributable to claimant's work-related injury. Claimant was not taken back to work because the treating physician had imposed permanent restrictions which the employer could not accommodate. Because claimant has sustained a wage loss, the Board finds claimant is entitled to a permanent partial general (work) disability under K.S.A. 44-510e(a).

Turning now to the task loss component of the equation, the Board finds that it is not persuaded by Dr. Collins' opinion that claimant bears no task loss. Claimant testified that Dr. Collins gave him restrictions which he relayed to his employer. Those restrictions were severe enough that respondent was unable to accommodate claimant and terminated him.

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[5] *Id.* at 15.

[6] Respondent argued that claimant has the "capacity" to earn as much as 18 hours of overtime per week and as a result, suggests that $270 per week of overtime should be added to the post-injury average weekly wage. This would increase his post injury wage and further limit respondent's exposure for work disability under K.S.A. 44-510e(a). K.S.A. 44-511(b)(1) references "average weekly overtime" as calculated in K.S.A. 44-511(b)(4). It does not permit either the employer or the employee to select the highest or lowest week of overtime as a means to manipulate the net wage result. Thus, respondent's argument is rejected.

When deposed, Dr. Collins did not recall issuing any restrictions and when asked, he testified that claimant bore no task loss based upon Michael Dreiling's vocational task analysis. According to Dr. Collins, he recommended that claimant merely use proper body mechanics and the only restriction he offered was that "if-it-hurt-stop-it."[7] Although Dr. Collins conceded claimant had undergone a functional capacities evaluation (FCE) on December 5, 2003, at his request, he testified that he found it of limited value. Yet, he apparently gave claimant some restrictions which claimant, in turn, relayed to his employer. And those restrictions were sufficient enough to persuade respondent that claimant could not be accommodated.

Under rather insistent cross examination by claimant's counsel, Dr. Collins admitted that the FCE indicated claimant arguably had some limitations which, when taken into consideration, suggested to Dr. Collins that claimant had lost the ability to perform 5 of the 11 tasks outlined by Mr. Dreiling. Nonetheless, Dr. Collins adamantly maintained that claimant bore no task loss as a result of this accident and was fully capable of performing any and all of the tasks identified in Mr. Dreiling's analysis, including his position with respondent. Dr. Collins testified that the FCE, while suggestive of some limitations in claimant's work abilities, provided only limited application as it was nothing more than a snapshot of claimant's abilities on a given day. Claimant would continue to improve and therefore, he did not believe it was reasonable to formulate restrictions based upon the FCE.

In contrast, are the opinions of Dr. James Stuckmeyer, the physician retained by claimant's attorney to provide an evaluation and opinion as to claimant's task loss. Dr. Stuckmeyer testified that claimant sustained a 73 percent task loss as a result of his work-related injury, again based upon Mr. Dreiling's task analysis. Dr. Stuckmeyer's restrictions of no lifting greater than 35-40 pounds on a repetitive basis, limit prolonged standing, walking stair climbing or repetitive traversing of steps and no repetitive lifting[8], more closely parallel the limitations revealed by the FCE and are similar to those understood by claimant when he was released from treatment by Dr. Collins. Claimant maintains this task loss analysis is the more well reasoned opinion while respondent urges the Board to adopt Dr. Collins' zero percent task loss opinion.

The Board has considered the physicians' opinions and concludes it is more persuaded by the opinions of Dr. Stuckmeyer. While it is true that Dr. Stuckmeyer examined claimant only once and Dr. Collins was the treating physician, the latter's opinion as to a lack of restrictions and task loss are difficult to accept in light of the FCE results. Moreover, claimant says he was given restrictions upon his release *from Dr. Collins* and those same restrictions were given to his employer and were the trigger for his loss of

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[7] Collins Depo. at 29.

[8] Stuckmeyer Depo., Ex. 2 at 4 (Jan. 27, 2004 IME Report).

employment. Accordingly, the Board finds claimant sustained a 73 percent task loss as indicated by Dr. Stuckmeyer.[9]

When the 73 percent task loss is averaged with the 38 percent wage loss, the result is 55.5 percent work disability. The Board finds the ALJ's Award should be modified to reflect a 55.5 percent work disability.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated January 21, 2005, is modified as follows:

The claimant is entitled to 27.86 weeks of temporary total disability compensation at the rate of $432 per week or $12,035.52 followed by 30.71 weeks of permanent partial disability compensation at the rate of $432 per week or $13,266.72 for a 17.25percent functional disability followed by permanent partial disability compensation at the rate of $432 per week not to exceed $100,000 for a 55.5 percent work disability.

As of July 29, 2005 there would be due and owing to the claimant 27.86 weeks of temporary total disability compensation at the rate of $432 per week in the sum of $12,035.52 plus 86.57 weeks of permanent partial disability compensation at the rate of $432 per week in the sum of $37,398.24 for a total due and owing of $49,433.76, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $50,566.24 shall be paid at the rate of $432 per week until fully paid or until further order from the Director.

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[9] The Board notes that the ALJ's conclusions are not wholly unreasonable in light of Dr. Collins' opinions which indicate claimant bears no task loss. However, the Board is not persuaded by Dr. Collins' testimony as it appears he was somewhat ill-informed about claimant's case, the FCE results and the fact that claimant was terminated as a result of restrictions which he issued upon claimant's release from treatment.

**IT IS SO ORDERED.**

Dated this _____ day of July, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Keith L. Mark, Attorney for Claimant
Michelle Daum Haskins, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director